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AN

AUTHENTIC COPY

OF THE

JUDGEMENT

DELIVERED BY THE

L Murray

RIGHT HON. EARL MANSFIELD,

NOVEMBER 16, 1784,

IN THE CASE OF

THE KING

AGAINST

WILLIAM DAVIES SHIPLEY,

DEAN OF ST. ASAPH.

LONDON:

PRINTED FOR JOHN STOCKDALE,

OPPOSITE

BURLINGTON-HOUSE, PICCADILLY.

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LONDON:

To the PUBLIC.

MANY Gentlemen having inquired for the Judgment of the Court of King's Bench, in the Caſe of *The King againſt the Dean of St. Aſaph*, a Correct Copy of which has not yet been publiſhed; the Publiſher has with difficulty obtained the following Note of the Opinion delivered by Lord MANSFIELD, which is Authentic. He has not been able to get Notes of the Opinions of the other Judges. The whole Court agreed, that

there ſhould not be a New Trial. Judgment was afterwards arreſted, in conſequence of ſome Defect in the Indictment.

London,
Feb. 10*th*, 1785.

THE

THE KING

AGAINST THE

DEAN OF ST. ASAPH.

THIS Motion, to ſet aſide the Verdict, and grant a new Trial, for the miſdirection of the Judge, ſuppoſes that, upon the Verdict, either as a general or as minutes of a ſpecial to be reduced into form, Judgment may be given; for, if the Verdict was defective, and omitted finding any thing within the province of the Jury to find, no Judgment could be given, and there muſt be a *venire de novo*; conſequently this motion would be improper.

FOUR

FOUR objections have been made to the direction of the Judge.

FIRST, one peculiar to this cafe, and therefore I begin with it; that he did not leave the evidence of a lawful excufe or juſtification to the Jury, as a ground for acquitting the Defendant.

CIRCUMSTANCES merely of alleviation or aggravation, are irrelevant upon the Trial; they are immaterial to the Verdict; and they may be made uſe of when Judgement is given, to increaſe or leſſen the puniſhment.

CIRCUMSTANCES which amount to a lawful excufe or juſtification, are proper upon the Trial, and can only be uſed then. Upon every ſuch defence there ariſe two queſtions:

queſtions: One of Law, the other of Fact; the firſt to be decided by the Court, the ſecond by the Jury; whether the fact alledged, ſuppoſing it true, be a legal excuſe, is a queſtion of Law; whether the allegation be true, is a queſtion of Fact; and according to this diſtinction the Judge ought to direct; and the Jury ought to follow the direction, though by means of a general verdict, they are intruſted with the power of confounding Law and Fact, and following the prejudices of their affection or paſſion.

The circumſtances urged in defence are, the Letter of 24th January, to Mr. Edwards, and the Advertiſement, and what is ſaid by Edward Jones, of the converſation with the Defendant on the 7th of January.

Upon

Upon this part of the caſe, we muſt ſuppoſe the paper ſeditious or criminal then: The Defendant *knowing it had been ſtrongly objected to*, publiſhes it with an Advertiſement, avowing and juſtifying the doctrine.

The next circumſtance is from the evidence of Edward Jones; that the Defendant knew the Paper was objected to, as having a ſeditious tendency, and might do miſchief, if tranſlated into Welch; and therefore that deſign was laid aſide: And this he knew on the 7th of January, and ſent it to be printed on the 24th, and was read at a County Meeting, with a rope about his neck (as he ſaid) and that it was *not ſo bad*.

We are all clearly of opinion, that if the writing be criminal, theſe circumſtances

are

are aggravations, and ought not to have been left as any excuſe.

What was meant by ſaying the Affidavit ſhould have been ſet out in the Indictment, I don't comprehend; much leſs, that blaſphemy may be charged in the Scripture, by ſtating half the ſentence.

If any part of the context qualifies what is ſet forth, it may be given in evidence*. Every circumſtance which tends to prove the meaning, is every day given in evidence; and the Jury are the Judges, and muſt find the meaning.

Second objection, That the Judge did not give his own opinion, whether the

* King v. Bear. Salk. 417.

writing was a Libel, or ſeditious, or criminal.

THIRDLY, That the Judge told the Jury, they ought to leave that queſtion upon the record to the Court, if they had no doubt of the Meaning and Publication.

FOURTHLY, That he did not leave the Defendant's Intent to the Jury.

THE anſwer to theſe three objections is, that, by the Conſtitution, the Jury ought not to decide the queſtion of Law, whether ſuch a writing, of ſuch a meaning, publiſhed without a lawful excuſe, be criminal. That they cannot decide it againſt the Defendant, becauſe, after a Verdict, it remains open upon the Record. Therefore it is the duty of the Judge to adviſe the

the Jury to ſeparate the queſtion of Fact from the queſtion of Law: And as they ought not to decide the Law, and the queſtion remains entire for the Court, he is not called upon to tell them his own opinion.

It is almoſt peculiar to the form of proſecution for a Libel, that the queſtion of Law remains entirely open for the Court upon the Record, that the Jury cannot decide it againſt the Defendant; ſo that a general Verdict, That the Defendant is guilty, is equivalent to a ſpecial Verdict in other caſes. It finds all which belongs to the Jury to find, and finds nothing as to the queſtion of Law. Therefore, when a Jury is ſatisfied of every Fact within their province to find, they have been adviſed to find the Defendant guilty, and in that

ſhape to take the opinion of the Court upon the Law; and no caſe has been cited of a ſpecial Verdict, in a proſecution for a Libel, leaving the queſtion of Law upon the Record to the Court; though, to be ſure, it might be left in that form—but the other is ſimpler and better.

A CRIMINAL intent from doing a thing in itſelf criminal, without a lawful excuſe, is an inference of Law. Where an innocent act is made criminal, when done with a particular intent, there the intent is the material fact to conſtitute the crime.

THE ſubject matter of theſe three objections has ariſen upon every trial for a Libel ſince the Revolution, now near one hundred years ago.

In every reign there have been many ſuch trials, both of a private and public nature.

In every reign there have been ſeveral, defended with all the acrimony of party animoſity, and a ſpirit ready to conteſt every point, and to admit nothing.

During all this time, as far as it can be traced, one may venture to ſay, that the direction of every Judge has been conſonant to the doctrine of Mr. Judge Buller, and no Counſel has complained of it by an application to the Court.

Counsel for the Crown, to remove the prejudices of the Jury, and to ſatisfy the by-ſtanders, have expatiated upon the enormity of the Libel. Judges, with the ſame

ſame view, have ſometimes done the ſame thing. Both have done it, wiſely, with another view, to obviate the captivating harangues of Defendants' Counſel to the Jury, that they can and ought to find, That in Law the Paper is no Libel. But the formal direction of every Judge, under which every Lawyer has ſo far acquieſced as not to complain of it to the Court, ſeems to me, ever ſince the Revolution, to have been agreeable to the direction of Mr. Judge Buller.

It is difficult to cite caſes; the trials are not printed. Unleſs a queſtion ariſes, notes are not taken. Nobody takes a note of a Direction—of courſe not diſputed.

We muſt, as in all caſes of tradition, trace backwards, and preſume from the uſage

uſage which is remembered, that the precedent uſage was the ſame.

The Craftſman was a celebrated Party Paper*, wrote in oppoſition to the Miniſtry of Sir Robert Walpole, by many men of high rank and great ability: The whole Party eſpouſed it. It was thought proper to proſecute† the famous Hague Letter; I was at the trial; it happens to be printed in the State Trials, 1731.

There was a great concourſe, great expectation, and many perſons of high rank were preſent, to countenance the Defendant. Mr. Fazakerley and Bootle were the leading Counſel for the Defendant:

* Queen v. Tutchin, 1704. Salk. Satisfied pub. in London.

† Feb. 1729. King v. Clark. Lord Raymond. Fact, printing and publiſhing only in iſſue.

ant: They ſtarted every objection, and laboured every point, when the Judge over-ruled them—He uſually ſaid, if I am wrong, you know where to apply.

The Judge was Lord Raymond, Chief Juſtice, who had been eminent at the Bar in the reign of Queen Anne; Solicitor and Attorney General in the reign of George the Firſt; intimately connected with Sir Edward Northey; ſo that he muſt know what the ancient practice had been.

The Cauſe was ſo blended with party paſſion, that it required his utmoſt attention; yet when he came to ſum up, and direct, he does it, as of courſe, juſt as Mr. Judge Buller did. Fazakerley and Bootle, very able Lawyers, and connected in Party with the Writers of the Craftſman,

man, never thought of complaining to the Court. The other trials before Lord Raymond are not printed, nor to be found in any Notes; but to be ſure his direction in all was to the ſame effect. I recollect one where the Craſtſman was acquitted, from a ballad made by Mr. Pulteney:

For Sir Philip well knows,
That his inuendos
No longer will ſerve him,
In verſe or in proſe;
For twelve honeſt men have decided the Cauſe,
Who are judges of Fact, tho' not judges of Laws.

There are no notes of the trials before Lord Hardwicke, or Chief Juſtice Lee, before 1752, when the caſe, King againſt Owen, came on before Chief Juſtice Lee. It happens to be printed in the State Trials. I attended as Solicitor General. Chief Juſtice Lee, the moſt ſcrupulous obſerver

and follower of precedents, directed, as of courſe, in the ſame way Mr. Judge Buller has done.

When I was Attorney General I proſecuted ſome Libels. One I remember: The King againſt Nutt. He was convicted, under the ſame direction, by Lord Chief Juſtice Ryder.

In 1756 I came into the office I now hold: Upon the firſt proſecution for a Libel which ſtood in my paper, I think it was the caſe of The King againſt Shebbeare, I made up my mind as to the direction I ought to give: I have uniformly given the ſame, almoſt in the ſame form of words: No Counſel ever complained of it to the Court. Upon every Defendant being brought up for judgment, I

have

have always ſtated the direction I gave; the Court has always aſſented to it.

The defence of a lawful excuſe never exiſted in any caſe before me; therefore I told the Jury, if they were ſatisfied with the evidence of the publication, and that the meaning and inuendos were as ſtated, they ought to find the Defendant guilty. The queſtion of Law was upon the Record, for the judgment of the Court.

This direction being, as of courſe, and no queſtion raiſed concerning it in Court, though I have had the misfortune to try many Libels, in very warm times, againſt Defendants moſt obſtinately and factiouſly defended, there are no notes or reports of what paſſed.

In one caſe, The King againſt Woodfall, on account of another kind of queſtion, there is a Report, and there the direction is adopted by the whole Court as right, and the doctrine of Mr. Judge Buller laid down in expreſs terms.

Such a judicial practice in the preciſe point, from the Revolution, as I think, down to the preſent day, is not to be ſhook by general theory arguments, or popular declamation,

Every ſpecies of criminal proſecution has ſomething peculiar in the mode of procedure; therefore general propoſitions applied to all, tend only to complicate and confound the queſtion.

No deduction or concluſion can be drawn

drawn from what a Jury may do, from the form of the procedure, to what they ought to do, upon the fundamental principles of the Conſtitution, and the reaſon of the thing, if they will act with integrity and a good conſcience.

THE fundamental definition of Trials by Jury, depends upon an univerſal maxim without an exception *ad queſtionem*.

WHERE the queſtions can be ſevered, by the form of the pleadings, the diſtinction is preſerved upon the face of the Record, and the Jury cannot encroach upon the juriſdiction of the Court. Where, by the form of pleading, the two queſtions are blended together, and cannot be ſeparated upon the face of the Record, the diſtinction is preſerved by the honeſty of the

the Jury. The Conſtitution truſts, that, under the direction of a Judge, they will not uſurp a juriſdiction which is not their province.

They do not know, and are not preſumed to know, the Law; they are not ſworn to decide the Law; they are not required to do it: If it appears upon the Record, they ought to leave it there, or they may find the Facts, ſubject to the opinion of the Court upon the Law.

But upon the reaſon of the thing, and the eternal principles of juſtice, the Jury ought not to aſſume the juriſdiction of Law.

They do not know, and are not preſumed to know, any thing of the matter; they do not underſtand the language in which

which it is conceived, or the meaning of the terms; they have no rule to go by, but their paſſions and wiſhes. It is ſaid, if a man gives a right Sentence upon hearing one ſide only, he is a wicked Judge, becauſe he is right by chance only, and has neglected taking the proper method to be informed. So a Jury who uſurp the Judicature of Law, though they happen to be right, are themſelves wrong, becauſe they are right by chance only, and have not taken the conſtitutional way of deciding the queſtion.

It is the duty of the Judge in all caſes, upon general iſſues, to tell the Jury how to do right, though they have it in their power to do wrong, which is a matter between God and their own conſciences.

To

To be free, is to live under a Government by Law. The Liberty of the Preſs conſiſts in printing without any previous licence, ſubject to the Conſequence of Law.

The Licentiouſneſs of the Preſs is Pandora's Box, the ſource of every evil.

Miserable is the condition of Individuals, dangerous is the condition of the State, if there is no certain Law, or, which is the ſame thing, no certain Adminiſtration of Law, to protect Individuals, or to guard the State.

Jealouſy of leaving the Law to the Court, as in other caſes, is *now*, in the preſent ſtate of things, puerile rant and declamation. The Judges are totally independent

of

of the Miniſters that may happen to be, and of the King. Their temptation is rather to the Popularity of the Day; and I agree with the obſervation cited by Mr. Cowper from Mr. J. Foſter, that a popular Judge is an odious and pernicious character.

The Judgment of the Court is not final; in the laſt reſort it may be reviewed in the Houſe of Lords, where the opinion of all the Judges is taken.

In oppoſition to this, what is contended for? That the Law ſhall be, in every particular cauſe, what any twelve men, who ſhall happen to be the Jury, ſhall be inclined to think, liable to no review, and ſubject to no controul; under all the prejudices of the Popularity of the Day, and

under all the bias of intereſt in this town, where thouſands, more or leſs, are concerned in the publication of Newspapers, Paragraphs, and Pamphlets. Under ſuch an Adminiſtration of Law, no man could tell, no Counſel could adviſe, whether a paper was or was not puniſhable.

I AM glad that I am not bound to ſubſcribe to ſuch an abſurdity, ſuch a ſoleciſm in Politics; but that, agreeable to the uniform judicial practice ſince the Revolution, warranted by the fundamental principles of the conſtitution of Trials by Jury, and upon the reaſon and fitneſs of the thing, I am of opinion this Motion ſhould be rejected, and the Rule diſcharged.

FINIS.

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